Home Depot, U.S.A., Inc. *and* United Retail & Industrial Union Local 282, R.W.D.S.U. Cases 34–CA–4505, 34–CA–4527, and 34–CA–4651

May 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On December 5, 1990, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and a brief in support of the judge's decision. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The complaint alleges, and the judge found, among other things, that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by: causing the arrest of and initiating criminal prosecution of Union President Philip Peeler to bar him from all access to its North Haven facility and obtaining police intervention to bar, and by barring, Union Secretary-Treasurer Brian Peeler from all access to its North Haven facility.[3] The Respondent excepts and we agree with this exception for the reasons that follow.

As more fully described by the judge, Philip Peeler, the union president, and his son Brian, the Union's secretary-treasurer, initially visited the Respondent's North Haven store about May 15, 1989. Philip[4] admitted seeing a sign on the Respondent's door stating ''no soliciting.'' Nevertheless, while in the store Philip gave, or attempted to give, business cards to several employees.

Assistant Manager James Wargo testified that he followed Philip. When Philip asked Wargo why he was following him, Wargo told Philip that he was giving him ''customer service.'' Philip replied that he was going to be in the store every day. Wargo told Store Manager David Foster that people were distributing cards and disturbing employees. According to Foster, Wargo told him that the Peelers refused either to stop distributing the cards or to leave. Foster informed his managers that the Peelers were not allowed in the store and that they should call the police and request a trespass warrant if the Peelers returned.

On May 17, 1989, the Peelers returned to the store. Assistant Store Manager Roy and a police officer approached the Peelers. The officer asked Philip to leave. Roy stated that on May 17, 1989, he forever ''barred'' the Peelers from entering the store because the Peelers had violated the Respondent's no-solicitation rule.

On November 22, 1989, Philip went to the store alone to make a purchase. The police were called. The police told Philip that the Respondent would have him arrested if he entered the store again.

On February 28, 1990, both Peelers entered the store, purchased three sets of fireplace fixtures, and left. The Peelers then reentered the store and asked to exchange a damaged fireplace fixture set. After some discussion, a police officer, who had arrived after being called, told Philip that he would be arrested. The officer took Philip outside, placed him in the back of the police car, and wrote a summons which stated that Philip had committed a misdemeanor, ''criminal trespass 1st degree.''

The judge found that on May 15 the Peelers solicited on the Respondent's selling floor in violation of the Respondent's valid no-solicitation rule and that Philip stated that he would be back, at the Respondent's store, continuously. The judge also found, and the General Counsel does not dispute, that the Respondent understood from Philip's statement that the purpose of the Peelers' return would be ''to continue to engage in solicitation on the sales floor.'' The judge reasoned, however, that as no solicitation occurred during the Peelers' November 22, 1989 and February 28, 1990 visits to the store, the ''Respondent was not justified in preemptively prohibiting the Peelers' entry to the store or barring them on the possibility that they may engage in solicitation of workers.'' We disagree.

The statutory purpose served by allegations of 8(a)(1) violations based on an employer's exclusion or ejection of nonemployee union organizers from its property is the protection of the rights of *employees* to ''learn the advantages of self-organization from others.'' *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel filed a motion to strike those portions of the Respondent's answering brief in which the Respondent argues that employee Robert Hughes should not be reinstated or receive backpay. The Respondent filed a reply and opposition to the General Counsel's motion.

We grant the General Counsel's motion to strike the Respondent's opposition to the reinstatement and backpay remedy as to employee Hughes. This, however, does not preclude the Respondent, in the compliance stage of this proceeding, from raising the alleged unsuitability of employee Hughes for reinstatement.

[3] Only the incidents of November 22, 1989, and February 28, 1990, are alleged to be violations of the Act.

[4] When separate references are made to the Peelers, only their first names will be used.

113 (1956), quoted in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). The issue in this case is, therefore, whether the rights of employees were affected by the actions taken by the Respondent after Philip Peeler, accompanied by his son Brian, engaged in *unprotected* soliciting activity in the public selling areas of the Respondent's store and made a statement to the assistant manager reasonably understood as threatening to return repeatedly to engage in that kind of activity. In particular, we must decide whether the Respondent interfered with, restrained, or coerced employees in their exercise of Section 7 rights when it responded to the unprotected solicitation activity by prohibiting the Peelers from thereafter entering the store for any purpose and having Philip Peeler arrested when he did. We see no impact on employee rights.

First, there is no claim that the Peelers enjoyed any protected right to engage in future solicitation activities *in the store*. The store is not an in-store public restaurant like those involved in such cases as *Montgomery Ward & Co.*,[5] in which the Board has held that union organizers patronizing the restaurant may not lawfully be prohibited from engaging in solicitations of off-duty store employees so long as the solicitation is carried on ''only as an incident to the normal use of such facilities.''[6] Rather, the Respondent's store is a facility that comes under the long established rule that an employer may lawfully prohibit union organizers from soliciting on the selling floor of a retail establishment. *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

Second, there is no supportable contention that prohibiting the Peelers from entering the store in the future would result in the employees' being denied access to information about the Union. The Peelers continued to contact employees by other means, and, indeed, the contentions of the General Counsel and the Charging Party in this case rest on the claim that the Peelers did *not* intend to solicit employees during visits to the store after the May 15, 1989 incident. Rather, it is their claim that the Peelers simply intended to shop for such items as fireplace equipment.

Third, there is no showing that the Respondent allowed other customers to solicit on its selling floor regarding matters other than union membership or that it ever tolerated the return of someone who had both engaged in solicitation contrary to the Respondent's unwritten rule *and* made a statement reasonably understood as a threat to return repeatedly for that purpose.[7] In short, there is no showing of discriminatory application of the rule.

We fail to see how employees are coerced or restrained in their exercise of Section 7 rights by a prohibition (1) that was issued in response to unprotected activity, (2) that does not impede lawful soliciting of employees, and (3) that is not shown to constitute a discriminatory application of a general rule regarding in-store solicitation. It may well seem unfair of the Respondent to deny the Peelers shopping privileges in its store simply because of their involvement in unprotected activity there, but the Board has no statutory mandate to remedy unfairness in the provision of shopping opportunities. We are authorized to find a violation and grant a remedy only if we find interference, coercion, or restraint in the exercise of Section 7 rights. We see no basis for such a finding here. Accordingly, we shall dismiss the complaint insofar as it alleges that the Respondent's actions in regard to the Peelers violated Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 4, 5, and 6 and renumber the subsequent conclusions of law.

ORDER

The National Labor Relations Board orders that the Respondent, Home Depot, U.S.A., Inc., North Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their activities on behalf of the Union.

(b) Interrogating its employees regarding their union membership, activities, and sympathies.

(c) Creating the impression among its employees that their union activities are under surveillance by the Respondent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Hughes immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have

[5] 256 NLRB 800 (1981), citing *Marshall Field & Co.*, 98 NLRB 88 (1952), modified on other grounds and enfd. 200 F.2d 375 (7th Cir. 1953).

[6] Thus, *Montgomery Ward & Co.*, 288 NLRB 126, 127 (1988); and *Ameron Automotive Centers*, 265 NLRB 511, 512 (1982), relied on by the judge in finding a violation, are also distinguishable, because they are within this same line of cases. Because these cases are not here applicable, we find it unnecessary to determine whether *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), affects this line of precedent.

[7] The judge cited examples of small contractors soliciting customers in the store for installation jobs, but there was no evidence that any of these incidents involved contractors who, when told to cease because of the Respondent's in-store solicitation prohibition, vowed to keep returning to the store.

suffered in the manner set forth in the remedy section of the judge's decision.

(b) Remove form its files any references to the discharge of Hughes and notify him in writing that this has been done and that evidence of the discharge will not be used as a basis for any future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in North Haven, Connecticut, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER TRUESDALE, concurring.

I concur with my colleagues that the Respondent did not violate Section 8(a)(1) of the Act by barring Union Officials Philip and Brian Peeler from the Respondent's retail store and by causing Philip Peeler's arrest and initiating criminal trespass prosecution against him,[1] but only for the following reasons:

Union President Philip Peeler and Union Secretary-Treasurer Brian Peeler, wearing union buttons, visited the Respondent's store on May 15, 1989, and gave business cards to a few employees. As the judge found, it was obvious that the Peelers were engaged in solicitation of employees for membership in the Union. Philip told a store manager, who followed him around the store, that he would be in the store every day. After they left the store, the union officers were told by one of the Respondent's managers that soliciting was not permitted in the store and, that if they returned to the store, they would be arrested.[2] Philip then stepped back into the store but departed when told that the Respondent was going to call the police.

The union officers returned to the store 2 days later and were ordered to leave. Philip, thereafter on three to eight occasions, parked his car, which had a large union sign on the roof, in the store parking lot and engaged in organizational solicitation in the parking lot without being disturbed by the Respondent.

On November 22, 1989, Philip again entered the store, wearing a union button. On recognizing Philip, the Respondent summoned the police. The police officers who found Philip in the parking lot told him not to enter the store again or he would be arrested. On February 28, 1990, both Peelers, who were not wearing union buttons, made a purchase at the store, briefly departed, and then returned, ostensibly because one of the purchased items was missing parts. The Respondent summoned the police, who told the Peelers that they were not allowed in the store. The police arrested Philip for trespassing. This encounter between the Peelers and the police occurred in part near the store's service desk and in part in the store's back office area. Only the November and February incidents are alleged as violations.

As this case concerns access to private property for nonemployee union organizational activity, the Supreme Court's *Lechmere*[3] decision is applicable. Under that decision, nonemployee union representatives are not entitled to access to an employer's private property to engage in organizational activity unless either ''the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels''[4] or ''the employer's access rules discriminate against union solicitation.''[5] There is no showing here that reasonable attempts by the Union to communicate with the Respondent's employees through the usual channels, short of entering the Respondent's store, would be ineffective. Indeed, the Union engaged in solicitation activities in the store parking lot undisturbed. Additionally, as my colleagues note, the Respondent did not treat the Union disparately in prohibiting solicitation by its officers. Accordingly, under *Lechmere*, the union officers were not entitled to access to the Respondent's store to engage in organizational activities.

Thus, the union officers' May 15 effort at soliciting inside the Respondent's store was unprotected, and the Respondent acted lawfully in informing the officers not to return to the store, particularly in light of Philip's statement to a store manager, after Philip was observed soliciting employees, that he would be returning

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] I concur in adopting the judge's unfair labor practice findings as to the other complaint allegations.

[2] There is a ''no soliciting'' sign on the store's front entrance door.

[3] *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[4] Id. at 537, quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[5] Id. at 535, quoting *Sears Roebuck & Co. v. Carpenters San Diego District Council*, 436 U.S. 180, 205 (1978).

to the store every day. Furthermore, in view of Philip's statement and the union officers' continued organizational efforts, it was reasonable for the Respondent to believe that their November 22 and February 28 entries into the store were, at least in part, for organizational purposes. Thus, it was permissible for the Respondent to eject them when on those occasions they entered the Respondent's store contrary to the Respondent's prior lawful directives to them not to return.[6]

The judge's finding of a violation was based on precedent holding that union organizers patronizing an in-store public restaurant may not be prohibited from soliciting *off-duty* employees in the restaurant incident to normal use of the restaurant.[7] However, most if not all of the employees whom the Peelers solicited were on duty. Moreover, this precedent is inapplicable to solicitation of store employees on the sales floor of a store. As a retailer, the Respondent was privileged to prohibit solicitation even of off-duty employees on the sales floor.[8]

While it is well established that a retailer unlawfully interferes with Section 7 rights of employees by expelling, in the employees' presence, union representatives who conduct themselves solely as store customers,[9] no such violation has been established in the present case. Here, the Respondent reasonably believed that the union officers were not conducting themselves solely as customers. Moreover, although the judge found that the union officers were expelled in the presence of employees, he cited no supporting evidence, and, as the Respondent notes, there is very little evidence of this. During the November incident, Philip was already in the parking lot when he was told by the police not to enter the store again, and there is no testimony that any employee witnessed this incident. The February encounter between the Peelers and the police occurred inside the store, but again there is no specific evidence that any employee witnessed it. Moreover, as the Peelers did not wear union buttons during the February incident, it has not been shown that any employees who may have witnessed this event knew that the Peelers were union officials. Consequently, I agree that under the circumstances of this case, the Respondent's barring the Peelers from the store on November 22 and February 28 and causing Philip's arrest and initiating criminal trespass prosecution against him did not violate Section 8(a)(1).

[6] Consequently, in my view, this case does not present the issue of whether an employer may violate Sec. 8(a)(1) by excluding from a retail store a nonemployee union representative who is solely a customer.

[7] See, e.g., *Montgomery Ward & Co.*, 256 NLRB 800 (1981).

[8] See, e.g., *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983).

[9] See *Central Hardware Co.*, 181 NLRB 491 (1970), enf. denied in relevant part 439 F.2d 1321 (8th Cir. 1971); *Heck's, Inc.*, 156 NLRB 760 (1966).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge our employees because of their activities in behalf of the Union.

WE WILL NOT interrogate our employees regarding their union membership, activities, and sympathies.

WE WILL NOT create the impression among our employees that their union activities are under surveillance by us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Hughes full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, with interest, for any loss of pay suffered as a result of our discrimination against him.

WE WILL remove from our records any reference to the discharge of Robert Hughes and notify him in writing that this has been done and that his discharge will not be used against him in any way.

THE HOME DEPOT, U.S.A., INC.

Thomas Doerr, Esq., for the General Counsel.
Kevin J. McGill, Esq. (Clifton, Budd & DeMaria), of New York, New York, and *Gerald Woodward*, of Jacksonville, Florida, for the Respondent.
Robert Cheverie, Esq. (Ashcraft & Gerel), of Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to charges filed by United Retail & Industrial Union, Local 282, R.W.D.S.U. (Union) on November 13 and 29, 1989, and on March 6, 1990, in Cases 34–CA–4505, 34–CA–4527, and 34–CA–4651, respectively, complaints were issued in those cases on December 27, 1989, January 5 and April 11, 1990, against Home Depot, U.S.A., Inc. (Respondent).

The complaints allege that Respondent (a) unlawfully discharged employee Robert Hughes; (b) obtained police intervention to bar Union President Philip Peeler from all access to its facility for any purpose, and barred him from all access to its facility for any purpose; (c) caused the arrest and initiated criminal prosecution of Union President Philip Peeler to bar him from all access to its North Haven facility for any purpose; (d) obtained police intervention to bar Union Secretary-Treasurer Brian Peeler from all access to its facility

for any purpose, and barred him from all access to its facility for any purpose; (e) interrogated employees concerning their union membership, activities, and sympathies; and (f) created the impression of surveillance of its employees' union activities.

Respondent's answers denied that it violated the Act, and a hearing was held before me in Hartford, Connecticut, on April 25–27 and on June 27, 1990.

On the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, having its main office and place of business in Atlanta, Georgia, with a facility in North Haven, Connecticut, has been engaged in the retail sale of hardware, plumbing, and related products. During the 12-month period ending March 31, 1990, in the course of its operations, Respondent derived gross revenues from its operations in excess of $500,000 and purchased and received at its North Haven facility goods valued in excess of $50,000 from points located outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a large retail home improvement center which sells hardware, plumbing, electrical supplies, plants and gardening materials, etc. The North Haven store, which is the facility involved, opened to the public on March 2, 1989. It employs about 160 employees. In addition to Store Manager David Foster, about 8 assistant managers and 10 department supervisors, all of whom are statutory supervisors, are employed at the store.

Robert Hughes began work on February l, 1989, prior to the store's opening. He helped set up the store for its opening, and was employed thereafter as a salesperson in the gardening and hardware departments.

B. *The Alleged Solicitation, Arrest, and Barring from the Store*

1. The Peelers' May 15 visit[1]

Employee Hughes believed that a union was needed at the store and, in early May 1989, called the Union and spoke with Union President Philip Peeler.

Philip Peeler and his son Brian, the Union's secretary treasurer, visited the store on about May 15, 1989. They were there for a dual purpose: to explore the possibilities of organizing the store—attempting to interest the employees in the Union, and to shop for items they needed. They each wore a 2-1/4-inch lapel button which stated: ''UNION YES.''[2]

According to Philip,[3] while walking in the store, he asked an employee if the store was a good place in which to work. The worker answered that it was. Philip asked if he had any complaints or problems, and the employee said that he had none. Philip gave his business card to an employee who was walking with one or two others. Philip then purchased some ladder hooks, and placed his business card on the checkout counter. The cashier said that she could not accept it. Philip picked it up and put it in his pocket.

After they left the store, Assistant Store Manager Pierre Roy stopped them and told them that soliciting was not permitted in the store. Philip replied that he was not soliciting. Roy answered that he was soliciting for the Union by distributing cards, and warned that if he solicited again he would call the police or have him arrested. Philip, answering the challenge, stepped into the store. Roy asked him to wait while he called the police, whereupon Philip announced that he was leaving, and he and Brian did so.

As to that visit, Philip stated that he gave out at least one or maybe two business cards in order to ''identify'' himself, and not to solicit. He denied speaking to anyone about the Union. No one asked him to leave the store and no one offered him the alternative of handing out cards and leaving the store or ceasing his distribution of cards and remaining as a shopper. I cannot believe that he merely sought to ''identify'' himself. He conceded that no one asked him to identify himself, and he further stated that the purpose of handing out the cards was to prompt a call to the Union if the workers were interested. As noted above, one of his purposes in being at the store was to interest employees in the Union.

Philip testified that after that first visit he understood that he had been asked by Roy not to return to the store.

Employee Brian Aherne testified that on May 15 he asked the Peelers what he could do for them. Brian asked what he could do for Aherne, and gave him a business card. They had no further conversation. Aherne gave the card to his assistant manager. Apparently alerted to the presence of the Peelers, Assistant Manager James Wargo told Store Manager David Foster that people were distributing cards in the store, disturbing employees, and causing a ''commotion.'' Foster was given six of the Peelers' business cards that day, but discarded three of them. Foster conceded that all the Peelers' cards received by him were received by him that day.

Gerald Woodward, the president of Affiliated Business Resources, and Respondent's consultant for labor and employee relations, testified that Foster called him that day and told him that there were ''union people'' soliciting employees. Woodward stated that he probably told Foster to follow them, and if they distribute cards ask them to leave, and if they refuse to leave, call the police.

[1] There is some confusion as to the actual dates of the Peelers' visits to the store in May, with the General Counsel's and Respondent's witnesses testifying as to different dates. However, I need not resolve this discrepancy as there is no dispute that the first incidents occurred in mid-May 1989.

[2] Other customers enter the store wearing union insignia on their clothing. Respondent ignores such insignia.

[3] For clarity, when separate references are made to the Peelers, their first names will be used.

Wargo testified that he followed Philip through the store. When asked why he was being followed, Wargo said that he was giving him ''customer service.'' Philip told him to wear a mileage meter because he would be in the store every day. Wargo replied that he would keep following him. Cashier Diane Noble and Wargo testified that Philip left the business card on the checkout counter.

Roy denied speaking to the Peelers that day, and apparently the confrontation with Philip outside the store was with Wargo. According to Foster, Wargo told him that the Peelers were asked to leave the store or stop handing out cards as requested, and refused to do either.

Foster then told his managers that the Peelers were not to be permitted in the building because they were soliciting and would not obey instructions to stop soliciting or leave the premises. Foster further instructed the managers to call the police and request a trespass warrant if they returned, based on Philip's statement to Wargo that he would return every day.

2. The Peelers' May 17 visit

The Peelers again wore the union buttons on their visit to the store. They were followed by Assistant Manager Roy. Philip was then approached by Roy and a police officer, who asked what he has doing in the store. Philip replied that he was shopping. The officer said that Respondent called and said that Philip was soliciting. Roy and an employee told the officer that they were soliciting, and the officer asked Philip to leave. Philip denied that he has soliciting. Brian asked if he would be permitted to remain if he entered the store to shop. Roy said he would not be permitted to remain. Philip asked the officer if he would be arrested if he did not leave and the officer said he would. They then returned the ladder hooks purchased previously.

Roy conceded following the Peelers that day after he was told that they were in the store. He saw them talking to a customer, but did not see them do anything else that day. He testified that he told the officer that they were soliciting and distributing cards ''the prior day'' and that he did not want that to occur again. Roy admitted that on May 17 he forever ''barred'' the Peelers from entering the store. The reason he barred them was that they violated the no-solicitation rule.

3. The Peelers' May 23 visit

The Peelers parked their car in Respondent's parking lot. The roof of the car bore a large sign with the name of the Union. Respondent made no attempt to remove the car or the Peelers from the lot.

At about this time, Store Manager Foster distributed a letter to employees urging them to remain ''union-free.'' The letter stated, in part, as follows:

> As many of you are aware, Union Organizers have been in our store during the last few days. These unwanted individuals violated our no-solicitation policy and were escorted out of the store. Since the Union Organizers said they would be back, I want each of you to be informed of what has happened. The Home Depot is against this union organizing attempt and I caution you not to sign anything unless you know what you are obligating yourself for. Do not let anyone mislead you that signing a card will get you more of anything, or that the only purpose of the card is to get an election.

4. Philip Peeler's November 22 visit

Philip visited the store alone to make a purchase. He was wearing the union button described above. He spoke to two employees concerning purchases he was making. One employee asked him about the button he was wearing, saying he was not allowed to wear it in the store, because there was a no-solicitation rule. Philip said he was not soliciting, and noted that she was wearing a Home Depot button. That employee asked him about a local strike, and Philip responded that he knew nothing about that strike. The police were called to the store and an officer asked him what he was doing in the store. Philip said he was shopping. In fact, Philip had purchased some items. The officer said that Respondent complained that he was soliciting. Philip denied doing so. The officer told him not to enter the store in the future, and warned that if he did so again the Company would have him arrested.

5. The Peelers' February 28, 1990 visit

The Peelers purchased three sets of fireplace fixtures. One box appeared to be resealed. As Philip waited for Brian to bring the car to the loading area, he asked Roy to open the box with him to ensure that all the parts were enclosed. Roy refused. The Peelers put the boxes into the car and then examined the resealed box and found certain parts missing. Philip asked to exchange the box for an undamaged one. Roy, accompanied by a police officer, would not accept it. Philip threatened that he would stand outside the store and advise customers that Respondent does not honor its ''return'' policy. The officer then told Philip that he would be arrested. He took him outside and put him in the back of the police car. The officer wrote a summons, which stated that Philip Peeler committed the following ''misdemeanor: criminal trespass 1st degree.'' The summons was answerable in the State of Connecticut Superior Court. When Philip was released from the police car, Roy was asked by the officer to state his position. Roy stated that Philip had been advised about his presence in the store, and Roy did not want him in the store as a customer or for any other reason. Roy also said that he did not want Brian in the store. Brian then was permitted to return the resealed box. The Peelers have not returned to the store since that time.

The trespass summons against Philip was dismissed in court.

6. Respondent's no-solicitation rule and its application

Respondent's no-solicitation, no-distribution rules, as set forth in its employee handbook, are as follows:

> No employee will be allowed to engage in solicitation for subscriptions, memberships, or other outside activities at any time in selling areas. No employee will be allowed to engage in such solicitation in non-selling areas during that employee's working time or with another employee during the other employee's working time. Any employee who does so and thereby interferes with his or her own work or the work of another em-

ployee will be subject to disciplinary measures, including discharge.

The only exception to this rule will be solicitation for recognized charities, and in such event, bulletin board notice giving approval for such solicitation will be posted.

There will be no distribution of literature, pamphlets, or printed material of any kind by employees in work areas or selling areas of our premises at any time.

A decal on the store's entrance door says ''Shirt and Shoes Required—No Soliciting.''

Respondent's officials gave their understanding of the no-solicitation policy, which interpretations varied from the written rule set forth above.

Respondent's managers Foster and Roy, and consultant Woodward testified consistently that Respondent's no-solicitation policy means no soliciting in the store by anyone with no exceptions. That rule applies to everyone, including employees, customers, vendors, contractors, and charitable organizations, including the sale of Girl Scout cookies.

Managers Foster and Roy testified that occasionally private contractors will solicit the store's customers, offering to install merchandise purchased by the customer at the store. Such solicitation is also prohibited and, when observed, the contractor is asked to stop soliciting—stop distributing his business cards or leave the store. Such solicitation appears to be quite common. Employee Brian Aherne testified that in the year that he has been employed in the store he has been given business cards from vendors and contractors, 30 to 40 times.

Roy stated that whenever asked to desist the contractor has done so, and was thus not barred from the store. They stated that a contractor who does not obey their instructions and continues to hand out his cards, would be barred from the store. Foster stated that Peeler was the only person who, when asked to stop distributing cards, refused to do so, and was thus barred from the store.

Roy has barred from the store, shoplifters, comparative shoppers from Respondent's competitors, an unruly customer who refused to quiet down or leave the store, and a customer who attempted to strike the store manager. The police were called in cases of shoplifters and the attempted assault.

The police have not been called when contractors solicit customers, because in all such cases the contractors have stopped soliciting when asked. Foster stated that the police were called for the Peelers because they refused to stop soliciting when asked, and refused to leave the premises. The Peelers assert that they only distributed cards that first day, and were never given the choice of stopping their solicitation or leaving the store. Further, Philip stated that on his first visit to the store no one asked him to leave.

C. *The Discharge of Hughes and Other Alleged Violations*

Robert Hughes became employed by Respondent in February 1989 prior to the North Haven store's opening in March. He worked as a salesperson in the gardening and hardware departments. Store Manager Foster termed Hughes a slightly above average employee, having a good attitude. Hughes received regular pay raises at his 3- and 6-month review, and also received ''merit badges'' for good work.

Hughes phoned the Union in early May 1989 and spoke to Union President Philip Peeler. After the Peelers' visit in May, Hughes spoke to 10 to 15 employees regarding the need for union representation.

Hughes testified to three conversations with Respondent's officials which, it is alleged, violate the Act.

Hughes testified that in mid-May, Assistant Manager Roy came to his work area and asked him what Hughes thought about unions. Hughes replied that, historically, unions have done a lot of good things for workers. Roy then asked what he thought about having a union at the North Haven store. Hughes answered that some companies need a union, but ''it's all right here.'' Hughes then asked why Roy was questioning him, and Roy replied that he was curious.

Hughes further stated that in mid-June his supervisor, Jay Cragg, spoke to him and other employees individually. Cragg complimented him on his performance, and said that he was a positive influence on other employees. According to Hughes, Cragg then said that he heard that Hughes had been talking about unions, adding that this creates ''disharmony'' among the employees. Hughes replied that what he said privately to other workers was his personal business, adding that Cragg's comments might be considered as harassment.

Hughes also stated that on about October 18 Bernard Jobe, Respondent's loss prevention supervisor, approached him. They spoke about low employee morale and high employee turnover. Hughes asked Jobe whether Jobe had been a member of a union when he was employed on the police force. Jobe said that he was a sergeant and not a member of the police union. Jobe added that he respects the views of others and would hold in confidence anything Hughes told him. Jobe then asked him what he thought about unions. Hughes replied that they are needed in some companies.

Roy denied broaching the subject of unions with Hughes. He stated that Hughes would often bring up the subject of unions, stating that Roy would not have to work so hard if the Respondent recognized a union. Roy specifically denied asking Hughes in May what he thought of unions.

Cragg testified that on June 1, 1989, he met separately with several employees, including Hughes. The purpose of the meeting was to thank the members of his department for their hard work in the previous week. During their conversation, Cragg filled out and gave Hughes a notice of ''good iob performance recognition.'' Cragg's narrative noted that Hughes ''took initiative to help motivate and turn the department. . . . You are really helping out more than you realize. Thanks a million.''

Cragg further testified that during their conversation he told Hughes that there were certain rumors being circulated. Hughes interrupted, saying that if Cragg was talking about the union, Cragg and the Respondent could get in trouble since it was illegal to do this. Cragg said that he was not talking about unions since he had no opinion on that subject, but he was concerned about a rumor, allegedly circulated by Hughes, concerning Cragg and another employee. Hughes denied spreading the rumor.

Cragg denied raising the subject of unions with Hughes in that conversation, and Hughes denied receiving the employee notice during their talk about unions, as he testified.

Jobe testified that part of his responsibilities included reporting to Woodward union activity occurring at the store. He did so by phone and through written ''union incident re-

ports.'' His report, dated October 8, 1989, details his conversation with Hughes. Jobe denied approaching Hughes and also denied asking Hughes what he thought about unions. Jobe reported that Hughes said he would be resigning shortly. Jobe's report summarized by stating that Hughes is a ''disgruntled employee and a probable union connection. He is intelligent, articulated, well educated, but has an attitude problem at work.'' Jobe reported this conversation to Store Manager Foster. Foster testified that Jobe told him that Hughes was interested in forming a union, or words to that effect. Jobe's report also stated that Hughes told him that in April 1989, during the ''Peeler Boys' union activity,'' he was questioned by Roy concerning whether he was involved in that activity. Hughes told Jobe that if they asked him those questions again, he would go to the Labor Board.

Foster also conceded that Assistant Manager Roy reported to him, in March, April, or May, that Hughes told him that the store would be better off with a union. Roy admitted that he told Foster a couple of times that Hughes was interested in a union, adding that it was common knowledge that Hughes was speaking to other employees about a union.

Hughes was given special accommodation during part of his tenure at Respondent's facility. Hughes had to leave earlier than the midnight quitting time because the person picking him up was not available at that time. Assistant Manager Roy stated that when he agreed to this arrangement suggested by Hughes he knew of Hughes' union sympathies or activities.

1. Hughes' smoking and Respondent's smoking policy

Hughes testified that in about mid-April 1989 Assistant Manager Roy approached him, asked him for a cigarette and also asked if Hughes wanted to join him for a smoke. Hughes agreed, and they smoked cigarettes in the garden area of the store where customers are permitted to be present. Roy admitted smoking with Hughes on that occasion.

Again in that month, Hughes smoked alone during business hours in the same general area. Store Manager Foster saw him smoking and reminded him that that was a violation of company policy. Hughes admitted his error and apologized. Hughes testified that Foster told him not to do it again. Foster testified that he told Hughes that he would be fired if he was caught smoking again. Employee James Burns testified that immediately after this incident Hughes told him that Foster had found him smoking and Foster told him that he would be fired if he was caught smoking again.

Foster testified that he regards smoking in violation of the store's rules a serious offense, and that generally he regards a written warning as a more serious form of discipline than a verbal warning. He further stated that he would issue a written warning to an employee who he caught smoking for the first time, and he has done that when he managed a Home Depot store in Florida.

Hughes further stated that he smoked in the store during business hours with Assistant Manager Dennis Hovick.

Hughes testified that on October 26 a coworker asked him to carry some lumber to a Home Depot truck, which was waiting to receive it. Hughes carried the lumber outside the store, and began loading it onto the truck which was parked in the customer loading zone. Hughes then lit a cigarette, finished loading the lumber, extinguished the cigarette, and returned to the store. Store Manager Foster approached him and said he saw him smoking outside, and said he was discharged. Regional Manager Ken Dardas was standing next to him. Hughes asked whether discharge for smoking was excessive, and Foster said that he had told him about this once before.

Foster wrote a termination notice which stated in relevant part:

> Violation of company policies or procedures: Bob was smoking a cigarette in the customer loading zone in front of the store. It was covered in orientation that smoking in any undesignated area would result in termination. The customer loading zone is not a designated employee smoking area.

The termination notice bore the notation ''no'' as to whether any prior verbal or written notices were given, which Foster testified was a mistake. As of the time of his discharge, Foster considered Hughes to be a good employee with a good attitude, and a slightly above average worker.

The employee handbook sets forth Respondent's policy concerning smoking:

> If you smoke use the ash trays provided. Do not discard cigarette butts on the floor or in trash containers. Employees are not allowed to smoke in the warehouse or on the sales floor at any time. Smoking is allowed in the employee lounge and offices only. Other restrictions may apply in certain cities or localities.
>
> *Store regulations*—Smoking is permitted in authorized areas only. Violations of [this] policy will result in disciplinary action and possible termination.

The handbook also contains a list of 11 infractions, which, if they occur during business hours or on Respondent's premises, will result in immediate discharge. They include, but are not limited to: theft; use, sale, or distribution of drugs; being under the influence of drugs or consumption of alcohol; insubordination; carrying firearms; immoral conduct; fighting; horseplay which jeopardizes the safety of others; destruction of property; harassment of others; violation of timecard procedures; unauthorized markdowns; falsification of company records or documents; and conflict of interest, including solicitation of customers, and kickbacks from a vendor or supplier of Respondent.

Manager Foster stated that Respondent's smoking policy is as set forth in the handbook, and that no other restrictions apply to the North Haven facility. Foster also stated, however, that an employee on company time is not permitted to smoke outside the building. In addition, when the store is closed to customers, employees can smoke anywhere in the store. Foster stated the reason for this policy is that customer service is of first importance, and they would object to being in a smoke-filled environment.

Foster testified that he decided to fire Hughes solely because he was found smoking twice. There were only two prior incidents involving smoking by employees. On one occasion, Foster found employee Kenny Carrano smoking outside the receiving area and told him to stop. Carrano did so. Foster did not issue a written warning. Carrano's supervisor, Dennis Horvick, permitted Carrano to smoke in that area. Foster told Horvick that smoking there was not permitted. In

the other incident, Foster was told that an employee might have been smoking. Foster asked his assistant manager to investigate and no further action was taken.

Foster discharged two employees prior to his termination of Hughes. One was an assistant manager who was fired for arriving at work in an inebriated state, and the other was a cashier who was discharged for stealing.

2. Respondent's policy concerning unions

Respondent's employee handbook contains its policy concerning unions. It states as follows:

> The Home Depot is opposed to any union attempting to organize out employees and we will vigorously fight any and all attempts by any union to do so.
>
> WHY?
>
> Unions are outsiders who come between management and employees. They prevent employees and management from dealing with each other on a one-to-one basis. Unions cause labor strife and disharmony which in our competitive industry would hurt sales and hurt our employees, not help then, Unions are a negative influence and are not compatible with the team work which has made The Home Depot a success.
>
> The team spirit and ''whatever-it takes'' attitude generated by our employees has been our most important competitive advantage. We will fight any attempts by unwanted outsiders to destroy that team spirit.

Analysis and discussion

1. The alleged violations of Section 8(a)(1) of the Act

The complaints allege that on about May 20, June 15, and October 18, 1989, Supervisors Roy, Cragg, and Jobe, respectively, interrogated employees concerning their union activities. The complaints also allege that on June 15 Cragg created the impression among Respondent's employees that their union activities were under surveillance by Respondent.

All of these allegations relate to conversations that Hughes had with the above individuals.

As set forth above, Hughes testified that in mid-May Roy came to his work area and asked him what he thought about unions, and what be thought about having a union at the North Haven store. Hughes replied that historically unions have been helpful to working people, adding that some shops need them but that it is ''all right'' here. Roy denied bringing up the subject of unions during their conversation, stating that Hughes would often raise that topic, specifically telling him that if a union represented the workers, Roy would not be working so hard. This was during the ''start-up'' of the store.

This conversation between Hughes and Roy occurred in May, at the time when the Peelers first visited the store. The store officials were concerned at that time about the organizational attempt, and sought counsel from consultant Woodward. It is obvious that they would also have attempted to obtain information from employees as to their interest in the Union.

Accordingly, based on Hughes' testimony, which I credit, I find that Roy approached Hughes and asked him what he thought about unions and what he thought about having a union at Respondent's facility.

In evaluating whether questioning violates the Act, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. The Board will also examine the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.

Roy's questions of Hughes occurred in the context in which union organizers were being followed in the store, the police were called and they were escorted from the store. In addition, Respondent's statements in the employee handbook, and Store Manager Foster's letter to employees, distributed at about that time, set forth its policy that the union organization drive was unwanted and would be opposed by it. Hughes' replies were equivocal, indicating that he believed that an answer supporting the Union would not be well received. He gave ambiguous answers even though he was the one who called the Union and had spoken to employees concerning the need for organization. In addition, Assistant Store Manager Roy did not state any lawful purpose for the questioning and have no assurances against reprisal. *Link Mfg. Co.*, 281 NLRB 294, 298 (1986).

Respondent asserts that inasmuch as Hughes was an open and self-avowed union supporter, its questioning of him, assuming it occurred, was not unlawful. *Rossmore House*, 269 NLRB 1176 (1984). Here, however, there is no evidence that Hughes was a ''self-proclaimed and known union adherent.'' Hughes testified that certain employees knew he was interested in a union. His answers to Roy's questions certainly did not identify himself as such, and Jobe's later union incident report only identified him as a ''probable'' union connection. Unlike the situations in *Rossmore* and similar cases, Hughes did not openly declare himself as a union organizer, and his name was not listed as such in any material sent to the Respondent.

Accordingly, I find and conclude that Roy's questions of Hughes as to what he thought about unions, and what he thought about having a union at Respondent's facility constituted coercive interrogation, and violated Section 8(a)(1) of the Act.

Regarding Hughes' conversation with Supervisor Cragg, Hughes testified that in a private meeting in June, Cragg complimented him on his work performance, but then told him that he heard that Hughes had been talking about unions, adding that such discussion creates ''disharmony'' among the employees. Cragg denied this conversation, but admitted speaking with Hughes on June 1 concerning a positive job performance report. I do not credit Cragg. Cragg testified that at the meeting he became aware of a nasty rumor, allegedly spread by Hughes, which was disruptive of the department, but nevertheless Cragg, at the meeting, completed a highly complimentary report about Hughes' performance. It is unlikely, if that conversation occurred as described by Cragg, that Cragg would have been so laudatory about Hughes' work performance. Accordingly, I credit Hughes' testimony concerning this incident. In addition, Cragg's accusation that Hughes' conversations were creating ''disharmony'' among the workers is readily believable since Respondent's handbook makes the same point—that unions cause labor strife and disharmony and both the handbook; and Foster's letter in May, emphasize the ''team spirit'' essential to Respondent's success.

In determining whether an employer created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statement that their union activities have been placed under surveillance. *Rood Industries*, 278 NLRB 160, 164 (1986).

Cragg's remark that he heard that Hughes was talking about unions creates the impression of surveillance that Respondent was aware of his union activities. Hughes replied that what he speaks about in private to other employees is his business. Cragg's statement constitutes not only the creation of the impression of surveillance but also an attempt to interrogate because it solicits a reply regarding the employee's union sympathies. *Great Dane Trailers Indiana*, 293 NLRB 384 (1989). Indeed, Hughes' response that his private conversations with fellow employees are his business is a perfect example of how Hughes reasonably assumed that his discussions with employees concerning the Union were placed under surveillance. His answer also shows that he was forced to reply in a manner, which confirmed that he was engaging in discussions concerning the Union.

Hughes also testified that Loss Prevention Supervisor Jobe approached him. Hughes stated that this occurred on October 18, but I find that Jobe's written account of the conversation more accurately sets forth the date as October 8. They spoke about low employee morale and high employee turnover. Hughes initiated a conversation concerning unions by asking Jobe whether he had been a member of a union when he was employed by the police department. Jobe denied being a union member. Jobe then asked Hughes what he thought about unions, and Hughes replied that they are needed in some companies. Jobe denied asking Hughes this question. Even assuming the question was asked, I cannot find that it constitutes a violation of the Act. The conversation concerning unions was concededly begun by Hughes, with an inquiry about whether Jobe was a member of a union. Thus, Hughes ''opened the door'' to a similar inquiry by Jobe. Jobe's question was not as pointed. He did not ask Hughes whether he was a member of the Union involved here. He simply asked what he thought about unions.

Although the same question was asked by Roy, as to which I found a violation, the context of the questioning was different. Roy approached Hughes and asked him, without any preliminaries, what he thought about unions, and what he thought about having a union at the North Haven store. However, Jobe did not raise the issue of unions. Hughes did that. In this context, Jobe's question was innocuous and was part of the general conversation initiated by Hughes. Accordingly, I find that Jobe's question did not violate the Act.

2. The discharge of Hughes

The General Counsel's prima facie case consists of the following: Hughes was the person who called the Union, and initiated the organizing drive conducted by the Peelers. He was given literature by the Peelers and in April began speaking to 10 to 15 workers about the Union. Those workers knew of his interest in the Union. In May, Hughes was interrogated by Assistant Manager Roy and asked what he thought about unions generally, and specifically what he thought about having a union at the North Haven store. In June, Supervisor Cragg unlawfully told him that he heard that he was talking to employees about unions, and accused him of thereby creating ''disharmony'' among the workers.

On October 8, Loss Prevention Supervisor Jobe, in an oral report to Foster, and a written report to Foster's supervisor, Ken Dardas, labeled Hughes as a ''probable union connection'' who has an attitude problem. Jobe's report noted that Hughes told him that ''a union was really needed . . . to counteract all the prevalent labor abuses in the store.'' The report also quoted Hughes as stating that he was questioned by Roy about his ''complicity'' with the Peelers, and threatened that the next time he was questioned he would go to the Labor Board. Eighteen days later Hughes was discharged.

Based on the above, I find that Hughes' activities in behalf of the Union, consisting of speaking to employees about having a union represent them, and causing the Union to seek to organize the employees, when viewed against Respondent's strong opposition to unionization of its store, combined with the unlawful interrogations of Hughes by Roy and Cragg, and the unlawful creation of the impression of surveillance of Hughes' union activities by Cragg, and the communication to Managers Foster and Dardas, only 18 days before his discharge, of a report which branded him as a probable union connection who believed that a union was ''really needed'' at the store, all combine to convince me that Hughes' union activities were a motivating factor in Respondent's decision to discharge him. Thus, although Hughes may have been viewed, as early as April, as someone who was interested in a union, his identification, only 2 weeks before his discharge, as a probable union connection, served to make him a persona non grata among Respondent's officials. *Wright Line*, 251 NLRB 1083 (1980).

Having made this finding, the burden of proof shifts to Respondent to prove that it would have discharged Hughes even in the absence of his union activities. *Wright Line*, supra. Hughes was discharged for smoking in the customer loading zone immediately outside the store. The customer loading zone is considered by management to be among the no-smoking areas of the store.

Respondent asserts that Hughes' smoking was in violation of its no-smoking policy as set forth in its handbook, and as reiterated at orientation sessions. However, the written policy differs markedly from the actual practice in the store. The handbook policy, which Manager Foster says he applies at the store, states that ''employees are not allowed to smoke in the warehouse on the sales floor *at any time.* Smoking is allowed in the employee lounge and offices only.'' (Emphasis supplied.) However, Foster has permitted smoking, in violation of the policy, everywhere in the warehouse and on the sales floor when the store is closed to customers—that is prior to the store's opening and after its closing. Foster justifies his modification of the policy on the ground that the purpose of the no-smoking policy is to avoid offending customers, and if no customers are present, smoking is permissible in otherwise off-limits areas.

The rule has also been contravened by Respondent's own supervisors. Thus, Hughes smoked with Assistant Managers Horvick and Roy in the store in violation of the no-smoking rule, and Horvick permitted an employee under his supervision to violate the no-smoking rule.

Other employees were found smoking and were warned. Hughes, too, was warned by Foster on the first occasion when Foster found Hughes smoking on the sales floor. Respondent relies heavily on the fact that Hughes was the only employee found smoking twice, and argues that discharge

was the appropriate discipline for such an offense. Indeed, Hughes admits that he was warned by Foster not to do it again. Foster, corroborated by Supervisor Burns, stated that Hughes was warned that he would be fired if he was caught smoking again.

The manner in which the discipline was applied to Hughes differed too from the manner in which Manager Foster views the disciplinary process. Foster testified that he considers a verbal warning to be less severe than a written warning, and he would issue a written warning to someone found smoking the first time. In this case, however, Foster merely gave an oral warning to Hughes the first time he was found smoking. The next time Hughes was found smoking, Foster terminated him. No written warning was ever given to Hughes, or to any other employee found smoking in the store, and Hughes was the only employee terminated for smoking.

Hughes was discharged for smoking immediately outside the store in the customer loading zone, where customers load their vehicles with merchandise purchased in the store. Respondent argues that this area is within its no-smoking area. It makes this argument because customers are present in that area, and it is therefore part of the ''sales floor'' encompassed within the prohibition against smoking as set forth in the written policy. Such an interpretation of the no-smoking policy is highly questionable. There is no evidence that anything is sold outside the store. The customer loading zone is the area in which items are taken once purchased. The concern with customers being offended by cigarette smoke is somewhat diminished because of the smoker's being in an outdoor area. In addition, unlike the other no-smoking areas of the store where customers are not permitted to smoke, for example in the warehouse and on the sales floor, customers are permitted to smoke in the customer loading zone.

The basic question is what employees could be expected to know concerning whether smoking is permitted in the customer loading zone outside the store. The employee handbook is silent on the specific issue of the loading zone. It says, however, that smoking is permitted in authorized areas only, which are set forth as offices and employee lounges. By stating that smoking is prohibited in the warehouse and on the sales floor, employees may understandably believe that there is no restriction on smoking outside the building. There was no evidence that employees were told that smoking in the customer loading zone was prohibited. They were only told that smoking in undesignated areas violated the no-smoking policy. Hughes' termination notice written by Foster stated that employees were told at orientation that smoking in undesignated areas was prohibited. Foster also wrote that the customer loading zone is not a designated area for smoking. Apparently Hughes was unaware of this prohibition as he wrote on his termination notice that he was asked to help a fellow employee ''*outside the building*'' (emphasis in the original).

For Respondent to be permitted to rely on a rule to justify, the discharge of an employee, the rule must clearly specify the prohibited conduct, and that rule must be communicated to the employee so that the employee may behave in conformity with the rule. *E. R. Carpenter Co.*, 284 NLRB 273, 275 (1987). I do not believe that this rule meets that standard. There was no clear statement in the written rule or otherwise that smoking in the customer loading zone was prohibited.

Moreover, at the time he was smoking, Hughes was not helping a customer, who might have been, offended by his smoking. He was assisting a fellow employee load a Home Depot truck with merchandise, and he extinguished the cigarette before he entered the building.

Respondent further argues that in discharging Hughes it was not motivated by union considerations. It argues that Hughes' two written warnings for tardiness, in June and September 1989, provided it with sufficient reason to fire him, if it wished to. It further contends that if it sought to discriminate against Hughes it would not have agreed to accommodate his work schedule with his personal life. Respondent also notes that Jobe's report of October 8 advises that Hughes mentioned that he would be quitting his job shortly, and therefore Respondent would not have acted discriminatory but would have awaited his voluntary departure. All of these arguments have been considered.

Foster, the person who made the decision to discharge Hughes, testified that he sometimes sees written warnings. Thus, there was no evidence that he was aware that Hughes received two warnings for tardiness. He further stated that he was not aware that accommodations were made for Hughes to leave work early. As to Jobe's report that Hughes intended to quit his job, apparently, Foster was not willing to wait until Hughes left voluntarily. With Regional Manager Dardas at his elbow, Foster observed Hughes smoking, and consulted with Dardas as to whether he should fire Hughes, and Dardas gave his approval. It should be noted that Dardas was sent a copy of Jobe's report identifying Hughes as a probable union connection, and Foster was orally informed of the report.

Accordingly, I find and conclude that because of the (a) doubt as to what areas the no-smoking rule applies to, (b) failure to uniformly follow the no-smoking rule—specifically, Manager Foster's permitting smoking in the store prior to its opening and after its closing in violation of the written no-smoking policy which prohibits smoking at any time, (c) knowing violation of the policy by Assistant Store Managers Horvick and Roy who smoked with Hughes, (d) failure to give a written warning to Hughes the first time he was found smoking even though a written warning is more severe than an oral warning, and (e) lack of clarity in the rule concerning whether the customer loading zone is included in the prohibition against smoking, that Respondent was not shown that it would have discharged Hughes even in the absence of his union activities. *Wright Line*, supra.

3. The arrest and barring of the Peelers from the store

The complaints allege that Respondent on November 22, 1989, obtained police intervention to bar Philip from all access to its facility for any purpose, and barred him from all access to its facility for any purpose. Respondent's answer admits that on that date it called the police and barred Philip from reentry to its facility. The complaints also allege that on February 28, 1990, Respondent (a) caused the arrest and initiated criminal prosecution of Philip to bar him from all access to its facility for any purpose, (b) obtained police intervention to bar Brian from all access to its facility for any purpose, and (c) barred Brian from all access to its facility for any purpose.

The issue is the extent of access, if any, to be permitted to a nonemployee to engage in solicitation within a retail store.

Respondent asserts that it properly barred the Peelers from the store because they were soliciting in violation of its no-solicitation rule. The Union argues that even on their first visit, on May 15, the Peelers were not soliciting. The evidence indicates otherwise. They visited the store pursuant to a call from employee Hughes who was interested in union representation. They entered with the express purpose to ''explore the possibilities of organizing the store'' and interesting the employees in the Union. They spoke to employees on the sales floor. The Peelers approached one worker and asked him if he was satisfied with his employment at Home Depot and whether he had any complaints or problems. Employee Aherne asked the Peelers what he could do for them, and Brian asked what Brian could do for him, and gave him a business card. At least three union business cards were given to employees on the sales floor that day, including one attempted to be given to the cashier.

Based on the above, it is obvious that on May 15, the Peelers were engaged in solicitation of employees for membership in the Union, and attempting to interest them in organization. Philip's explanation that by giving out his business card he was identifying himself is true, but he was identifying himself as a union official who sought to represent the employees solicited.

It must be noted that Respondent is not being charged with any violations with respect to the Peelers' visits of May 15, 17, or 23. Rather, it is alleged that its actions on November 22, specifically, obtaining police intervention to bar Philip from all access to its facility for any purpose and so barring him, and on February 28, 1990, causing Philip's arrest, and barring Brian from the store, violated the Act.

The General Counsel and the Union assert that under the principles established in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), and *Jean Country*, 291 NLRB 11 (1988), Respondent unlawfully barred the Peelers. I do not believe that those cases, involving activities which occurred outside the premises of the particular businesses, apply to this case, which involved entry by nonemployees into a retail establishment. *Babcock & Wilcox* involved a situation where union organizers used private property (a manufacturing facility) to which the public is not invited. *Jean Country* involved picketing in a shopping mall.

In my view, the issue concerning Respondent's right to deny access to the Peelers is properly determined by analyzing that line of cases dealing with the activities of nonemployees in the store itself.

The Board has long held that in cases involving retail establishments, solicitation and distribution may be banned from the selling floor at all times. *May Department Stores Co*., 59 NLRB 976 (1944); *Goldblatt Bros., Inc*., 77 NLRB 1262 (1948); *Marshall Field & Co*., 98 NLRB 88 (1952); *Montgomery Ward & Co*., 145 NLRB 846 (1964); and *J. C. Penney Co*., 266 NLRB 1223, 1224 (1983). The reason for this broad rule is that such stores ''are frequented by customers of the employer, and union solicitation on the selling floors is, therefore, likely to be disruptive of the employer's business.'' *Meier & Frank Co*., 89 NLRB 1016, 1017 (1950). The Board in that case stated: ''[A]n employer has the right to keep union organizers off the selling floors, when . . . they appear upon the premises in performance of their duties as representatives.'' Id. at 1018.

The Charging Party argues that the Peelers should be permitted to engage in solicitation on the selling floor because Respondent engaged in disparate treatment by permitting contractors to solicit customers in the store, and by permitting vendors of the store to give business cards to store employees.

Respondent's store policy forbade contractors from soliciting store customers in the store. The evidence establishes that whenever a contractor was observed soliciting a store customer, by giving the customer a business card, the contractor was asked to cease soliciting store customers, and he did so. Thus, contractors were prohibited from solicitation. With respect to vendors of the store salesmen who represented companies with whom Respondent purchased its merchandise, such salesmen were permitted to give their business cards to store employees. Such activity has been permitted. In *Rochester General Hospital*, 234 NLRB 253, 259 (1978), the Board found that activities such as Red Cross postering, blood collection, postering of sales for a volunteer group, display of pharmaceutical products, and medical books were

> work-related activities that assisted the hospital in carrying out its community health care functions and responsibilities, and not such disparate application of a valid no-solicitation, no-distribution rule as to require the Respondent to waive its rule and permit access to its premises to nonemployee union organizers

See also *Ameron Automotive Centers*, 265 NLRB 511, 512 supra at fn. 10 (1982), where the Board stated that in finding that the employer violated the Act by ''enforcing the ban on solicitation by nonemployees in a discriminatory manner, we do not rely on the fact that on numerous occasions [the employer] permitted nonemployee tool salesmen to solicit sales on its premises.''

The actions of Respondent in response to the Peelers' activities in May 1989 are not in question. Indeed, with respect to their solicitation of employees, on May 15 on the selling floor, such activities could be properly banned, pursuant to the cases set forth above.

As set forth above, the Respondent's actions of November 22, 1989, and February 28, 1990, are specifically at issue. On November 22, Philip was shopping in the store, and wearing the ''Union Yes'' button. An employee asked him about the button and he responded. Evidence was adduced that other customers in the store wear clothing with union insignia, which Respondent ignores. Philip purchased an item that day. The basis on which Respondent called the police that day was that he was soliciting. The police officer told him not to enter the store and warned him that if he did so again the Respondent would have him arrested.

Similarly, on February 28, the Peelers were shopping in the store, and actually purchased some items. Philip was arrested that day on a charge of criminal trespass, after Respondent's official Roy told him that he was not allowed in the store.

Respondent's actions of November 22 and February 28 were based on its view that the Peelers violated its no-solicitation rule. An examination of that rule must be made.

The no-solicitation rule, as set forth above, and in the employee manual, applies only to employees. It prohibits employees from engaging in solicitation in selling areas at all times, and non-selling areas at certain times. There is no restriction, in that written rule, on the activities of nonemployees, guests, vendors or others. Nevertheless, as set forth above, Respondent, as a matter of law, may prohibit union solicitation on the selling floor.

Respondent's officials testified, however, that their application of the rule is broader than its written version. Thus, they stated that the no-solicitation policy applies to everyone, and every type of solicitation, even charities. The written rule, however, permits solicitation by charities, provided approval is obtained and posted.

Thus, Respondent made its own ad hoc rule applicable to nonemployees, such as the Peelers. They are permitted to do so where such a rule prohibited their solicitation on the selling floor. The General Counsel does not question that. However, he questions Respondent's barring of them from the store for all purposes, and obtaining the arrest of Philip.

There is no evidence that during the November or February visits the Peelers engaged in any solicitation of employees. Rather, the only evidence is that they engaged in legitimate shopping, and bought certain items, as customers. The Board has held that employers may not prevent persons from using their retail establishments in a manner consistent with the purpose of the facility, and where a public restaurant was part of a retail store, consistent with the conduct of other patrons of the restaurant. In *Montgomery Ward & Co*., 288 NLRB 126, 127 (1988), the Board stated:

> Even assuming the Respondent could have lawfully prevented Johnson from soliciting in the selling area, it could not prevent her from using its public restaurant in an orderly way, not disruptive of its business, even though she had earlier made appointments with employees on the sales floor.

In *Ameron Automotive Centers*, supra at 512 the Board stated that ''nonemployees cannot in any event lawfully be barred from patronizing the restaurant as general members of the public.'' See *Montgomery Ward & Co*., 162 NLRB 369, 379 (1966).

During the November and February visits, the Peelers' activities consisted of purchasing items offered for sale by Respondent. Their actions in purchasing goods were consistent with those of other customers buying items. Their activities were conducted in an orderly way and were not disruptive of Respondent's business.

Respondent seeks to justify its barring of the Peelers on the ground that after being warned, on May 15, not to return, they said they would be back continuously. The purpose of their return, as understood by Respondent, was to continue to engage in solicitation on the sales floor. However, there is no evidence that they engaged in solicitation of any kind during the November or February visits. The mere fact that they may have threatened to do so, does not mean that they could be barred if that did not, in fact, occur. Rather they acted as any other customers when they were in the store subsequently. Accordingly, Respondent was not justified in preemptively prohibiting the Peelers' entry to the store or barring them on the possibility that they may engage in solicitation of workers.

Respondent's official Roy testified that when Philip was in the store he was always talking in a loud manner. Philip explained that he is hard of hearing due to an injury and there is no evidence that he disrupted the Respondent's large store with his allegedly loud voice.

Inasmuch as there is no evidence that the Peelers were actually soliciting during the November or February visits to the store, the only reason for their being barred from the store was that they were union organizers, and Respondent sought to enforce a rule barring union agents from its premises. Such a broad rule is not valid. As set forth above, nonemployees cannot be barred from the store when they are acting in a manner consistent with other patrons. As set forth above, nonemployees not only may be lawfully in a retail store, but may solicit off-duty employees in an employer's public restaurant. *Montgomery Ward & Co*., 288 NLRB 126 (1988).

As to this activity, simply being in the store as customers, there is no evidence that anyone acting properly has ever been barred from the store. Respondent has barred from the store, shoplifters, comparative shoppers, an unruly customer who refused to quiet down or leave the store, and a customer who attempted to strike the store manager. The Peelers engaged in none of this activity during their November and February visits. Foster testified that Philip was barred from the store because, when asked to stop distributing cards, he refused to do so. There is no evidence to support this assertion. Foster appears to be relying on employee Wargo's testimony that on May 15 Philip threatened to return to the store every day. Although he did return to the store thereafter, there is no evidence that he engaged in any solicitation of employees. Rather, the Peelers acted as patrons of the store, buying various items.

Similarly, the police have not been called when contractors solicit customers. They have been called in cases of shoplifters and attempted assault.

Accordingly, I find and conclude that the Peelers were barred from the store in November 1989 and February 1990, through the maintenance and enforcement of an invalid rule prohibiting the entry into their public retail store of individuals who were union officials because they were union officials. Such activity by Respondent violated Section 8(a)(1) of the Act.

I similarly find and conclude that Respondent's obtaining of police intervention to bar the Peelers from, its store in November 1989, and February 1990, and causing the arrest and initiation of criminal prosecution of Philip Peeler to bar him from all access to its store for any purpose, also violated Section 8(a)(1) of the Act. These activities were done in the presence of Respondent's employees, and as a result their Section 7 rights were violated. *Montgomery Ward & Co*., 256 NLRB 800 (1981), 288 NLRB 126 (1988).

CONCLUSIONS OF LAW

1. The Respondent, Home Depot, U.S.A, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Retail & Industrial Union, Local 282, R.W.D.S.U., is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging employee Richard Hughes because of his activities in behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By maintaining and enforcing a rule, policy, or practice which bars Union President Philip Peeler and Union Secretary-Treasurer Brian Peeler from all access to its North Haven facility for any purpose, Respondent violated Section 8(a)(1) of the Act.

5. By obtaining police intervention to bar Union President Philip Peeler and Union Secretary-Treasurer Brian Peeler from all access to its North Haven facility for any purpose, Respondent violated Section 8(a)(1) of the Act.

6. By causing the arrest and initiation of criminal prosecution of Union President Philip Peeler to bar him from all access to its North Haven facility for any purpose, Respondent violated Section 8(a)(1) of the Act.

7. By interrogating their employees regarding their union membership, activities, and sympathies, Respondent violated Section 8(a)(1) of the Act.

8. By creating the impression among its employees that their union activities were under surveillance by it, Respondent violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to Richard Hughes it is recommended that Respondent offer him full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, such earnings to be computed in accordance with the formula in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

Also I shall recommend that Respondent expunge from its files any reference to the discharge of Hughes and notify him in writing that this has been done and that evidence of same will not be used as a basis for future personnel actions against him.

[Recommended Order omitted from publication.]

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